A **TIDALMARINE ENGINEERING SDN BHD**

v.

KERAJAAN MALAYSIA

B HIGH COURT MALAYA, KUALA LUMPUR
VARGHESE GEORGE JC
[SUIT NO: D21 NCC-19-2010]
24 NOVEMBER 2010

C ***CIVIL PROCEDURE:*** *Injunction - Temporary injunction - Whether may be granted against Government - Circumstances in which temporary injunction should not be issued - Whether injunction would interfere with public duty - Government Proceedings Act 1956, s. 29*

D ***CONTRACT:*** *Performance bond - Whether call on bond fraudulent or unconscionable - Whether facts established unconscionable conduct - Whether unconscionable conduct ground to refuse demand*

The plaintiff was the main contractor of a highway construction project (the project) for an original contract value of
E RM169,232,896.75. The plaintiff posted two bonds (a performance bond and an advanced payment bond) issued by Bank Islam Malaysia Berhad (BIMB), naming the defendant as beneficiary of the sums guaranteed therein. The original completion date of the project was 11 December 2009. However,
F after two extensions granted, the new completion date was 11 March 2011. On 11 May 2010, the defendant nevertheless proceeded to issue a notice terminating the contract on the basis that at the rate the plaintiff was progressing, it was anticipated that the plaintiff would not be able to complete the project by 11
G March 2011. Furthermore the level of completion as of 11 May 2010 was supposed to have reached 50.20% but that the plaintiff had only completed a level that reached 35.40%. The plaintiff alleged that the principal cause for the delay was the increase in price of materials encountered from the outset of the contract.
H The plaintiff also alleged that the impact of the price increase of materials was somewhat acknowledged by the defendant by a circular (the circular) issued on 6 August 2008, wherein the number of items covered by the price escalation clause from the original five items to eleven items. The circular however imposed
I two conditions, namely, that any contract price adjustment

recognising the additional materials/items would be effective as of 1 January 2008 only (namely for works carried out after that date) and the contractor, if they were not still satisfied, could opt for a mutual termination of the contract, in which event, 50% value of the existing bonds would be subject to forfeiture. The plaintiff was unhappy with these terms.

The plaintiff therefore sought an order, amongst others, restraining the defendant from parting with any sums received by the defendant from BIMB consequent to demands that had been made by the defendant under the terms of the two Bonds from the BIMB - until disposal of an arbitration proceedings or further order of the court. The basis of seeking this order was the contention of the plaintiff that the demand made by the defendant on BIMB was 'unconscionably' made and/or the defendant's conduct was tainted with 'unconscionability'. The issues for consideration therefore were (a) whether unconscionability was a ground to refuse a demand; (b) if it was, whether the defendant's conduct was unconscionable; (c) whether a temporary injunction could be issued against the Government; and (d) if so, in what circumstances.

Held (dismissing the plaintiff's application):

(1) The performance bond and advance payment bond were 'on-demand' or 'unconditional' bonds. BIMB was obliged to pay the defendant as beneficiary, the sums guaranteed according to the terms of the bonds upon a demand simpliciter by the defendant, without in any way being constrained by any protest or contest by the plaintiff or any third party. (para 11)

(2) The only exception recognised to the strict obligations to pay when a demand is made on an on-demand or unconditional bond, is when fraud is established on evidence before the court and where such fraud has been brought to the notice of the bank or issuer of the bond. (para 11)

(3) 'Fraud' encompasses some element of 'criminality' or deceit, whereas 'unconscionability' does not necessarily involve 'criminal' acts. However, there is no justification, in principle or policy, why the same assistance of the court should be withheld from a party who approaches the court for

intervention on the grounds of 'unconscionability' or *mala fide* acts on the part of the beneficiary, which if refused, could result in similar or more severe damage and loss to the aggrieved party as would happen in a 'fraud' context. (para 15)

(4) On the totality of the evidence, however, there was no case based on 'unconscionability' that could be made in respect of the demand issued by the defendant or of the conduct of the defendant, for the court to make any restraining order in favour of the plaintiff. (para 20)

(5) Our law recognises a distinction between temporary injunction and perpetual injunctions that may be issued by the court. Although a permanent injunction cannot be issued against the Government, issuing a temporary injunction pursuant to s. 29 of the Government Proceedings Act 1956 is subject to non-interference with the public duties of any department of the Government. On the facts of the case however, a restraining order if issued, would interfere with the public duty of the defendant's role and obligations on the construction project. (paras 24-26 & 28)

Case(s) referred to:

Bocotra Construction Pte Ltd & Ors v. Attorney-General (No 2) [1995] 2 SLR 733 ***(refd)***

China Airlines Ltd v Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Edward Owen Engineering Ltd v. Barclays Bank International Ltd (CA-UK) [1978] QB 159 ***(refd)***

Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(refd)***

Focal Asia Sdn Bhd & Anor v. Raja Noraini Raja Datuk Nong Chik & Anor [2009] 1 LNS 913 HC ***(refd)***

Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor [2007] 6 CLJ 18 CA ***(refd)***

Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd [2003] 3 CLJ 378 CA ***(refd)***

Kvaerner Singapore Pte Ltd v. UDL Shipbuilding (Singapore) Pte Ltd [1993] 3 SLR 350 ***(refd)***

LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor [2000] 3 CLJ 473 CA ***(refd)***

Lim Kit Siang v. United Engineers (M) Bhd & Ors [1987] 2 CLJ 195; [1987] CLJ (Rep) 170 SC ***(refd)***

Nafas Abadi Holdings Sdn Bhd v. Putrajaya Holdings Sdn Bhd [2004] 1 LNS 127 HC ***(refd)***
Pasukhas Construction Sdn Bhd & Anor v. MTM Millenium Holdings Sdn Bhd & Anor [2009] 6 CLJ 480 HC ***(refd)***
Potton Homes v. Coleman Contractors (Overseas) [1984] 28 Build LR 19 ***(refd)***
Royal Design Studio Pte Ltd v. Chang Development Pte Ltd [1990] 1 LNS 124 HC ***(refd)***
Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 2 CLJ 122 CA ***(refd)***
Satriadesa Corporation Sdn Bhd v. Tenaga Nasional Bhd [2010] 4 CLJ 877 HC ***(refd)***
Smith v. Inner London Education Authority [1978] 1 All ER 411 ***(refd)***
Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd [2010] 1 LNS 1355 ***(refd)***
Superintendent of Lands and Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd [2009] 6 CLJ 751 CA ***(refd)***
Tengku Haji Jaafar & Anor v. Government of the State of Pahang [1977] 1 LNS 139 ***(refd)***
The Radio & General Trading Co Sdn Bhd v. Wayss & Freytag (Malaysia) Sdn Bhd [1997] 1 LNS 400 HC ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, s. 29(1)(a)
Specific Relief Act 1950, s. 54(d)

For the plaintiff/applicant - Sanjay Mohan (K Govinard with him); M/s Kadir Andri & Partners
For the defendant/respondent - Zetty Zurina Kamaruddin SFC; AG's Chambers

Reported by EM Goh

JUDGMENT

Varghese George JC:

[1] On 17 September 2010 I had delivered my decision on encl. 3 in this action and stated in broad terms the grounds for my decision. I reserved the right then to issue a more complete grounds of decision, which I do now.

[2] The plaintiff was the main contractor of a highway construction project known as 'Projek Lebuhraya Pantai Timur Fasa 2 Pakej 3 dari CH 26100 to CH 40038, in Daerah Kemaman, Terengganu' for an original contract value of

RM169,232,896.75. As a requirement of the award of the contract by the defendant, the plaintiff had submitted or posted two Bonds where the defendant was the named beneficiary of the sums guaranteed therein. The Bonds were:

(i) a Performance Bond (Bon Perlaksanaan Kontrak Kerja) in the sum of RM8,461,645 dated 17 July 2007, and

(ii) an Advance Payment Bond (Jaminan Bank Untuk Bayaran Pendahuluan) in the sum of RM10,000,000 also dated 17 July 2007,

both of which were issued by Bank Islam Malaysia Berhad (BIMB).

[3] Enclosure 3 was the summon in chambers application of the plaintiff for interlocutory restraining orders. By the time the application came up for hearing however, the plaintiff was only seeking for:

(a) an order restraining the defendant from parting with any sums received by the defendant from BIMB consequent to demands that had been made by the defendant under the terms of the two Bonds from the BIMB – until disposal of an arbitration proceeding or further order of the court;

(b) alternatively an order directing the defendant to refund to BIMB any sum received from BIMB under the two Bonds; or,

(c) further alternatively, an order directing the defendant to retain any sum already received in an interest bearing account with BIMB until disposal of the arbitration or further order of this court.

Enclosure 3 was heard *inter parte* and pending the decision on the plaintiff's application therein, an *ad interim* order was put in place pursuant to the order of court initially made on 31 May 2010 and extended from time to time.

[4] The original completion date of the contracted works undertaken by the plaintiff was stipulated to be 11 December 2009. The defendant however had granted to the plaintiff two extensions of time; the first for three months, from 11 December 2009 to 11 March 2010, and the second from 11 March 2010 to 11 March 2011.

[5] On 11 May 2010 the defendant nevertheless proceeded to issue a notice of termination of the contract. It is material to take note of the reason stated for the termination of the plaintiff's contract. It was stated as follows:

> Dukacita diperhatikan bahawa tuan masih menggantungkan kerja di tapak sejak Oktober 2009 hingga ke tarikh surat ini dan kerja tuan dijangka tidak dapat disiapkan pada tarikh siap kerja yang telah ditentukan pada 11.03.2011. Kerja tuan sepatutnya sudah mencapai 50.20% siap tetapi kemajuan yang dicapai setakat ini hanya 35.40%. Kegagalan tuan itu masih berulang sungguhpun tuan telah diberi Notis untuk Tujuan Penamatan Pengambilan Kerja Kontraktor seperti yang tersebut di atas.

Essentially the defendant's basis for termination of the contract, as could be surmised from the above stated reason, was that the plaintiff had suspended all works on site since October 2009 and it was anticipated that the plaintiff would not be able to complete the works by the set completion date of 11 March 2011. Further the level of completion to date should have reached 50.20% of the total works but what had been achieved was only 35.40%. This failure on the part of the plaintiff had continued to occur despite notice of intention issued by the defendant to terminate the contract.

[6] The plaintiff by letter of 14 May 2010 had proceeded to challenge the termination of the contract by the defendant and had given notice to refer the dispute as to the legality of the termination to arbitration as provided for in the terms of the contract between the parties.

[7] The terms of the contract between the plaintiff and the defendant were in this case embodied in the Standard Form JKR 203A Contract. One of the provisions in the contract was cl. 53 which provided for a "Price Escalation" (Turun Naik Harga) mechanism to operate between the parties. By an addendum to the contract, five specific materials/items used in the construction were originally identified to be subjected to the price variation mechanism should there be an increase in the market price for those identified materials. The five items were Cement, Steel, Diesoline, Fuel Oil and Bitumen.

[8] The plaintiff alleges that the principal cause for the delay in completion of the contracted works being undertaken by the plaintiff was the increase in price of materials encountered from the outset of the contract. The plaintiff also alleges that the impact of the price increase of materials was somewhat acknowledged by the defendant who by a circular SPP Bil. 3 Tahun 2008 dated 6 August 2008 (the circular) had increased the number of materials/items covered by the price escalation clause from the original five items to eleven items.

[9] It was pointed out by the plaintiff that the circular however imposed two conditions, namely, that any contract price adjustment recognising the additional materials/items would be effective as of 1 January 2008 only (namely for works carried out after that date) and the contractor, if they were not still satisfied, could opt for a mutual termination of the contract, in which event, 50% value of the existing bonds would be subjected to forfeiture. It was clear to me that the plaintiff was not happy with the terms and wanted the adjustments to be effective from the commencement of the contract and also for further additional material/items to be added to the approved eleven materials/items used in the contract. The supplemental agreement proposed in the circular to be executed by the parties, if the terms of the circular were acceptable, were in the event not entered into by the plaintiff.

[10] What then transpired was that the defendant on 20 October 2009 alluding to plaintiff's intention to mutually terminate the contract forwarded to the plaintiff a draft of a mutual termination agreement (borang penamatan perjanjian bersama). The plaintiff did not also execute this agreement citing contradictions with certain terms of the circular.

[11] Performance Bond/Advance Payment Bond-On Demand Guarantees.

It was common ground between the parties that the performance bond and advance payment bond were in this case 'on-demand' or 'unconditional' bonds/guarantees. BIMB was obliged to pay the defendant as beneficiary the sums guaranteed as per the terms of the Bonds upon a demand simpliciter by the defendant, without in any way being constrained by any protest or contest by the plaintiff or any third party.

The law on this point is well settled based on a long line of decided authorities of higher courts in our jurisdiction and in other common law jurisdictions. (see: *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kindenko Sdn Bhd & Anor* [2007] 6 CLJ 18; *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283; *China Airlines Ltd v Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163, and *Edward Owen Engineering Ltd v Barclays Bank International Ltd* (CA-UK) [1978] QB 159).

The only exception recognised to the strict obligations to pay when a demand is made on an on-demand or unconditional bond or guarantee (and/or the beneficiary receiving the sum guaranteed) has been said to be where fraud was established on evidence before the court and where such fraud had been brought to the notice of the bank or issuer of the bond/guarantee. (see: *LEC Contractors (M) Sdn Bhd v. Castle Inn Sdn Bhd & Anor* [2000] 3 CLJ 473 and *Edward Owen Engineering (supra)*).

[12] The plaintiff's contention was not that the demand in the context of this case here was tainted with fraud. The sole basis for the plaintiff's application for the intervention of the court in this instant case was on the grounds that the demand made by the defendant on BIMB was 'unconscionably' made and/or the defendant's conduct was tainted with 'unconscionability'.

'Unconscionability', it was argued by the plaintiff, was an independent and separate exception (that is, in addition to the exception of 'fraud') that should be recognised in law to forestall payment being made to the beneficiary by a bank or issuer of bonds or guarantees of the on-demand/unconditional class.

[13] As support for his contention, counsel for the plaintiff relied on the Singapore Court of Appeal decision in *Bocotra Construction Pte Ltd & Ors v. Attorney-General (No 2)* [1995] 2 SLR 733. There Karthigesu JA (after making reference to Eveleigh LJ in *Potton Homes v. Coleman Contractors (Overseas)* [1984] 28 Build LR 19, LP Thean J (as he then was) in *Royal Design Studio Pte Ltd v. Chang Development Pte Ltd* [1990] 1 LNS 124 and GP Selvam JC (as he then was) in *Kvaerner Singapore Pte Ltd v. UDL Shipbuilding (Singapore) Pte Ltd* [1993] 3 SLR 350) said:

> In our opinion, whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payments or calls on bonds to be granted. Once this can be established, there is no necessity to expend energies in addressing the superfluous question of 'balance of convenience'.

This principle had been followed in several other cases in Singapore.

[14] The law in our jurisdiction might not be clear on 'unconscionability' as a separate exception to the strict obligation to pay or receive monies when it involves on-demand/unconditional bonds or guarantees. There has been some resistance to extend the position in Singapore laid out in *Bocotra*'s case to our shores.

[15] This is often attributed to one sentence in our Court of Appeal decision in *LEC Contractors (supra)*, which reads:

> Bad faith or unconscionable conduct by itself is not fraud.

As I have noted in another decision of mine (*Sumatec Engineering and Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd* [2010] 1 LNS 1355), our Court of Appeal may appear at first glance by that sentence to be averse to 'unconscionability' being received or adopted here as a distinct ground for the court's intervention. However, I would beg to state, on a full reading of that decision, that the focus of the learned judges appear to be on what constituted or did not constitute 'fraud' and whether it was pleaded in that particular case. As is accepted in law, 'fraud' would no doubt encompass some element of 'criminality' or deceit. 'Unconscionability', on the other hand, would not necessarily always amount to 'criminal' acts. I am of the view that there is no justification, in principle or policy, why the same assistance of the court should be withheld from a party who approaches the court for intervention on the grounds of 'unconscionability' or *mala fide* acts on the part of the beneficiary, which if refused, could result in similar or more severe damage and loss to the aggrieved party as would happen in a 'fraud' context.

[16] This issue has been considered by our courts more specifically and the following are some of the decisions of our High Court which have recognised, if not applied, this principle of law that 'unconscionability' is an additional exception or separate ground for the courts to intervene and allow restraining orders where the interest of justice require it be done,

(i) *Nafas Abadi Holdings Sdn Bhd v. Putrajaya Holdings Sdn Bhd* [2004] 1 LNS 127 (Suriyadi Halim Omar J, Shah Alam High Court),

(ii) *The Radio & General Trading Co Sdn Bhd v. Wayss & Freytag (Malaysia) Sdn Bhd* [1997] 1 LNS 400) (Kamalanathan Ratnam J),

(iii) *Pasukhas Construction Sdn Bhd & Anor v. MTM Millenium Holdings Sdn Bhd & Anor* [2009] 6 CLJ 480. (Mohd Hishamuddin Mohd Yunus, J),

(iv) *Satriadesa Corporation Sdn Bhd v. Tenaga Nasional Bhd* [2010] 4 CLJ 877 (Prasad S Abraham JC).

[17] In addition to the above Malaysian decisions, I make reference also to the recent decision of Mohamad Ariff J in *Focal Asia Sdn Bhd & Anor v. Raja Noraini Raja Datuk Nong Chik & Anor* (now reported in [2009] 1 LNS 913), where His Lordship made the following observation:

> The Singapore Court of Appeal in *Bocotra* ... accepted the legal position that the court will grant an interlocutory injunction restraining a beneficiary from calling on the bond on the ground of fraud or unconscionability ...
>
> In my view, the judicial and extra judicial views expressed in Singapore accord with good commercial sense, and unless precluded by higher authority and doctrine of precedents, I am of the opinion that this view point should be followed and adopted in Malaysia.

[18] In *Pasukhas Construction* case Hishamudin Mohd. Yunus J (as he then was) acknowledged the merits of recognising this further exception of 'unconscionability' as a separate and distinct one but felt constrained by binding precedent not to adopt the same. His Lordship's comments were as follows:

> In the light of *Esso Petroleum Malaysia Inc* and *LEC Contractors*, I am not at liberty to apply the unconscionability principle as propounded by the Singapore Court of Appeal case of *Bocotra Construction* - although some of our High Court decisions that I have mentioned above have applied that principle. *Bocotra Construction*, being a decision of the Court of Appeal of Singapore is a persuasive authority; and the principle of unconscionability that

it enunciated appears to me to be a sound principle. But, regrettably, I am bound by the doctrine of binding precedents. I am bound by the decision of the Supreme Court in *Esso Petroleum Malaysia Inc* (which applied the *American Cynamid* principles) or alternatively, by the Court of Appeal in *LEC Contractors* (which applied the fraud test).

[19] As noted further in my decision in *Sumatec Engineering and Construction* there, which I reproduce here:

> I am of the view that where a demand is made by a beneficiary in respect of an unconditional guarantee or bond, the development of law should be in the direction of recognising and accepting 'unconscionability' surrounding the demand or conduct of the party making the demand - as a further ground for intervention by the courts (in addition to the exception of 'fraud') to issue restraining orders in appropriate cases. Equity should come in and be unrestricted where the facts and circumstances require it to come to the aid of a party seeking justice.
>
> The availability of this further exception as an independent and separate one apart from fraud, however in my view, should be with one 'caveat', namely that there be placed before the court manifest or strong evidence of some degree in respect of the alleged 'unconscionable' circumstances or demand and not a bare statement or claim. However on the other hand it should not be too stringent and high as well, so as to stultify the equitable jurisdiction of the Court as observed by Mohamed Ariff, J, in *Focal Asia Sdn Bhd & Anor v. Raja Noraini Raja Datuk Nong Chick & Anor.* This additional exception should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.

[20] Having said that, although I was inclined to accept the additional exception of 'unconscionability' as a sound principle of law in our jurisdiction, I was not however persuaded or satisfied that on the totality of evidence (placed here by affidavit) before me, a case on 'unconscionability' in respect of the demand issued by the defendant or of the conduct of the defendant had been made out for the court to make any restraining order as applied for by the plaintiff.

[21] The plaintiff raised various issues in support of their allegation that the demand of the defendant was unconscionable. I have considered the explanation and rebuttals of Senior Federal

Counsel (SFC) for the defendant, to these ground relied upon by the plaintiff. It was the SFC's submission that in considering whether any one of the grounds cited or collectively all of the said grounds amounted to 'unconscionability', the court should also address the issue by asking the question whether there has been any 'bad faith' on the part of the defendant behind the demand or the conduct overall of the defendant under the contract or in respect of the two bonds if at all.

[22] Counsel for the plaintiff raised essentially four matters which he alleged constituted 'unconscionable' conduct on the part of the defendant. They were:

(i) The effect of price escalation of construction materials encountered during the currency of the contract which to some extent had been acknowledged by the defendant by the subsequent issue of the Circular.

In my assessment this is a contractual matter, in that the plaintiff well knew and accepted that price escalation mechanism would only be available in respect of five items when it entered into the contract. In response to appeals, the defendant agreed by the Circular to increase the affected items to eleven and this variation was already a concession given in good faith by the defendant. There is no basis to taint the conduct of the defendant in this respect or to treat the fact of increase in the construction materials/items as satisfying the test of 'unconscionability'.

(ii) There was still another year to go (pursuant to the second extension of time) for the contract to be completed and parties were still engaged in discussions when the contract was terminated and the demand on the bonds made.

In my assessment, the answer to this grievance lies in the reason cited by the defendant in the termination letter as reproduced earlier in this judgment. The road construction works were at a standstill despite notices of intention to terminate contract had been given to the plaintiff. There were no dispute raised as to the contentions of the defendant in respect of the status or progress of the works. Whether the

termination by the defendant was proper or wrongful is for another forum to determine. There was nothing to indicate 'unconscionability' on the part of the defendant in taking the contractual action they were entitled to as was done here.

(iii) The terms of the supplemental agreement in respect of variation of price and/or the mutual termination agreement was onerous on the plaintiff and in any event was not consistent to the Circular or as between them.

I did not find that the mutual termination agreement tendered to the plaintiff departed from or were in conflict with the matters set out in the Circular. I accept the learned SFC's submission thereto that on a proper reading of the relevant cls. 2.1 and 7.1, the total forfeiture of the value of the bonds would only apply if terms of that agreement were not complied with by the plaintiff, for example if all drawings were not returned by the plaintiff upon the termination. The plaintiff would be paid for all work carried out upon proof of work done prior to the supplemental agreement being entered into. The 50% forfeiture of the value of the bonds if the contract was mutually put at an end was consistent with the terms set out in the Circular and was necessary to meet expenses of retendering the contract and the increased costs incurred to complete the works.

It must be borne in mind that it was the plaintiff who had not agreed to the revision of the terms of contract by refusing to sign the supplemental agreement. I did not find anything 'unconscionable' in the actions of the defendant. To the contrary, I considered the defendant's conduct over the relevant span of time to be fair and more than reasonable to the plaintiff.

(iv) The letter issued by defendant to 'blacklist' the plaintiff illustrated a continuous unconscionable conduct of the defendant which was tantamount to exerting 'economic duress' on the plaintiff.

The alleged letter was only issued by the defendant after the contract had been terminated and subsequent to the demand on the bonds being made. This was an administrative step

taken in all cases of contractors who have defaulted. I could not understand how this step by the defendant after the demand on the bonds had been made and the contact terminated could taint the conduct or the demand of the defendant as an unconscionable act. No nexus with any past acts was shown for it to be even remotedly treated as 'continuous' harassment on the plaintiff.

[23] That aforesaid conclusion I have reached should dispose of this action. However if I should be held to be wrong in my approach and/or the conclusion reached as above, the next question that arises for consideration is whether an injunction or restraining order as applied for could lie against the Government in the first place. This calls for consideration the extent of the restrictions found in s. 29(1)(a) of the Government Proceedings Act 1956 either by itself or read together with s. 54(d) of the Specific Relief Act 1950.

[24] Our law recognises a distinction between temporary injunction and perpetual injunctions that many be issued by the court (see: Specific Relief Act 1950). Judicial views are however divided as to whether a temporary injunction or as is commonly referred to, an interlocutory injunction (pending disposal of a substantive suit or arbitration) as opposed to a permanent injunction can be issued against the Government, a Department of the Government or against officers or any related party to the Government.

[25] The decisions of the Supreme Court in *Lim Kit Siang v. United Engineers (M) Bhd & Ors* [1987] 2 CLJ 195; [1987] CLJ (Rep) 170 and the recent judgment of the Court of Appeal in *Superintendent of Lands and Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd* [2009] 6 CLJ 751 are cited as authority for the position in law that the courts discretion to grant injunctions are limited statutorily and do not extend to granting injunctions against the government, regardless of whether the injunction sought is interim/interlocutory or permanent.

On the other hand, the decision of our Court of Appeal in *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122 and the dicta found in the judgments of the Court of Appeal in *Kekatong Sdn Bhd v. Danaharta Urus Sdn*

Bhd [2003] 3 CLJ 378 and of the High Court in *Tengku Haji Jaafar & Anor v. Government of the State of Pahang* [1977] 1 LNS 139 are relied on to argue that s. 29 of the Government Proceedings Act 1956 does not prohibit the grant of a temporary or interlocutory injunction against the Government.

[26] The plaintiff's arguments in this instant case was to the effect that a temporary injunction or interlocutory injunction should lie against the Government and in any case, that the subject matter in question in this case was not to interfere with the public duties of any Department or of the Government. Counsel for the plaintiff's argued that the contract in this case was akin to a 'private contract' and was not caught by the limitation in s. 54 of the Specific Relief Act 1950 as it did not involve a 'public duty'.

[27] The learned SFC's submission, on the other hand, was that the road works-project was for the benefit of the rakyat. The money secured by the Bonds were to go towards the costs of completing the Project now necessitated by the appointment of another contractor. In any case, the monies guaranteed by the Advance Payment Bond was the refund of the balance of monies already advanced by the defendant to the plaintiff at the commencement of the contract. The element of 'public duty' was therefore, it was argued – clearly discernable here as the beneficiaries of the road project was the general public. The learned SFC for the defendant also laid stress on the decision of the English Court of Appeal in *Smith v. Inner London Education Authority* [1978] 1 All ER 411 that in any event where the defendant is a public authority performing duties to the public, one must look at the balance of convenience more widely and take into account the interest of the public in general to whom the duties are owed.

[28] While there may be a case to allow interlocutory injunctions against the Governments in appropriate cases on the rationale forcefully stated in *Sabil Mulia, Kekatong* and *Tuanku Jaafar*'s cases, I am inclined to restrict it to only where it is obvious and clear that the government's discharge of public duties are not interfered with in any way.

After giving due consideration to the arguments of respective counsel whether or not a 'public duty' would be interfered with or not in this case I take the position and accordingly hold that a restraining order as applied for here, if issued, will interfere with the 'public duty' or 'public element' of the defendant's role and obligations on the road project.

[29] My conclusion therefore is that on all counts, the plaintiff failed in this application. I therefore dismissed encl. 3 with costs and dissolved the *ad interim* order issued by me on 31 May 2010.

After conferring with respective counsel, I fixed the cost payable by plaintiff to the defendant at RM7,500.